

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AJE Enterprise LLC d/b/a  
Whisper Night Club and Lounge, et al.,  
Plaintiffs,

v.

Case No. 1:20-cv-00229-TSK

James Justice, in his capacity as  
Governor of West Virginia, et al.,  
Defendants.

Declaration of Dr. Lee B. Smith, Monongalia County Health Officer

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

1. I am Lee B, Smith M.D. I have served as the Executive Director and County Health Officer for the Monongalia County Health Department located in Morgantown West Virginia, from December 2014, to the present.

2. I attended medical school at Marshall University and obtained my Doctor of Medicine from Marshall University in 1978. I attended a general surgery residency program at Marshall University from 1982-1985.

3. I graduated from the West University College of Law in 1991.

4. I am a Fellow in the American College of Emergency Medicine.

5. I am licensed to practice medicine in the state of West Virginia.

6. I served from 2010 to 2012 as the Medical Director of the Bureau for Public Health, State Office of Emergency Medical Services, in the West Virginia Department of Health & Human Resources.

7. I served as the Medical Director of the Bureau of Public Health, Office of Threat Preparedness Health Care System Preparedness Grants Program, in the West Virginia Department of Health & Human Resources from 2008 until 2012.

8. I have been associated with the West Virginia University School of Medicine as a Instructor or Associate Professor since 1990 and am currently serving as a Clinical Associate Professor in the Department of Emergency Medicine.

9. From July 2000 to the present I have also served as a Clinical Associate Professor of Emergency Medicine for the West Virginia School of Osteopathic Medicine.

10. I have served as a guest lecturer on the subject of epidemiology for the West Virginia University School of Public Health.

11. Since Governor Justice's March 16, 2020 Declaration of a State of Emergency in connection with the COVID-19 pandemic, local Boards of Public Health in West Virginia, including the Monongalia County Health Department, have been charged with assisting in the enforcement of the Governor's Emergency Orders designed to limit the spread of the COVID-19 virus.

12. I am familiar with the transmissibility characteristics the COVID-19 virus as well as the various physical symptoms and disease courses experienced by persons infected with the COVID-19 virus.

13. I am familiar with the capacity of the intensive care units within West Virginia's hospitals as well as the number of ventilators within those hospitals for patients in severe respiratory distress.

14. From the early onset of the COVID-19 pandemic, I and other public health professionals in West Virginia have been concerned with the possibility that hospital resources

could be overwhelmed by the rapid spread of the COVID-19 virus. While that concern has abated in some degree as treatment modalities have improved and measures designed to prevent the spread of the disease have had some beneficial effect, a surge of COVID-19 cases in the late fall or winter in combination with seasonal flu cases still holds a significant potential to overwhelm available hospital resources in West Virginia and elsewhere.

15. I monitor current data on the COVID-19 pandemic published by the Center for Disease Control, Johns Hopkins University, the University of Washington Institute for Health Metrics, and the West Virginia Department of Health & Human Resources. Their data reflect persistent continuing transmission of COVID-19 in the population with resulting disease and death rates significantly in excess of normal rates of morbidity and mortality.

16. Development of a vaccine for COVID-19 is progressing, but much remains to be completed in terms of testing, manufacturing, and distribution before a vaccine can be deployed for use by the general population. I and other public health officials do not expect the widespread deployment and use of a COVID-19 vaccine until at-least mid-2021.

17. Many persons infected with the COVID-19 virus develop a sufficient viral load to spread the virus to other persons for a 48 to 72-hour period, before experiencing noticeable symptoms of the virus.

18. These asymptomatic individuals have the potential to spread the disease if they remain active in the community while they are asymptomatic. Physical contact in the form of dancing, hand-holding, hugging, or kissing, and singing, shouting, coughing, or sneezing all increase the risk of COVID-19 transmission.

19. The risk of exposure to the COVID-19 virus also increases among persons in enclosed areas and is particularly high in environments where people are in close proximity to

each other for extended periods of time without observing social distancing techniques or basic public health measures such as hand washing, wearing masks, and avoiding touching surfaces which are frequently touched by other persons.

20. As part of my responsibility as Executive Director of Monongalia County Health Department, I am responsible for supervising MCDH employees engaged in contact tracing for persons who have tested positive for the COVID-19 virus.

21. Bars, restaurants, congregate living quarters, day care centers, and church services have been identified in public health studies as locales with significant potential to spread the COVID-19 virus.

22. Exhibit 1 attached reflects data maintained under my supervision by the Monongalia County Health Department (MCHD) tracking COVID-19 cases in Monongalia County.

23. From March 1 until June 30, 2020, MCHD recorded 160 cumulative case of COVID-19. This caused closure of traditional clinics including TB, STDs, vaccinations, cancer screening, family planning, dental clinic and Women, Infants and Children (WIC) programs.

24. MCHD observed essential clinical service clinics diminished and shut down as a result of this surge and contact tracing was extremely difficult. State DHHR contact tracers were enlisted to provide support until assistance could be organized internally from our health department's Threat Preparedness Program, Dental Clinic, Women, Infants, and Children. as well as West Virginia University Shared Services.

25. During the month of July 2020, MCHD experienced a four-fold increase of COVID-19 with 670 new cases over a 4-week period, which crippled health department staff and function and required all hands-on deck to mount a response after four months of continuous work.

This surge of new COVID-19 cases in July 2020 followed reopening of bars and restaurants for on-premises sales in June 2020.

26. With Executive Orders closing bars in Morgantown, this surge diminished and on August 31, Executive Order 62-20 allowed bars to reopen despite requests to keep them closed. Unfortunately, COVID-19 cases once again increased exponentially and between August 1, 2020 and September 28, 2020, MCDH added an additional 1133 new and probable cases of COVID-19 in Monongalia County with daily counts of new cases peaking at nearly 100 on September 6, 2020. Bars were again closed by Executive Order September 2<sup>nd</sup>.

27. With the explosive outbreak occurring in July 2020, and again in September, MCHD has been overloaded with disease investigation and contact tracing that has measured in the thousands and necessitated hiring and requesting additional staff. MCHD has approximately 30 individuals working seven days per week made up of assets from the CDC/NIOSH, West Virginia National Guard, WVU School of Nursing and Medical Reserve Corps volunteers.

28. According to Harvard University metrics, when a county moves into a Red Zone, the mitigation strategy is for a stay at home order. Monongalia County has twice been in the Red Zone which has required the additional burden of increased community testing which pulls our workforce away from required duties. The result of extended additional duties in-house with disease investigation and contact tracing as well as field duties of weekly community testing has stretched staff to the breaking point and MCHD is facing eleven employee retirements occurring in the next nine months.

29. As evidenced by the press releases issued by MCDH in July and September, 2020, the ability of the Monongalia County Health Department to conduct effective contact tracing in order to quarantine persons exposed to COVID-19 is limited and it was severely strained in July

and September following the re-opening of bars due to the difficulty of identifying and contacting the large numbers of bar patrons present at the bars.

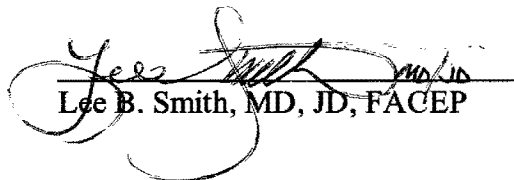
30. I have also been responsible for supervising the work of the Monongalia County Health Department sanitarians who have responsibility for the inspection of bars and restaurants in the City of Morgantown and outside the city in Monongalia County. Exhibit 2 attached is a summary of COVID-19 violations issued to bars and other businesses in Monongalia County by the MCDH.

31. Adherence to the 3-W's of Wearing a mask, Washing your hands, and Watching social distancing in bars and restaurants serving alcohol is especially critical in a university community like Morgantown where large numbers of students are living in congregate settings in dorms and they participate in classes with multiple students and faculty on a frequent basis.

32. In order to limit the spread and toll of the COVID-19 virus in the context of a pandemic, government officials and public health professionals need the flexibility of emergency orders to limit or suspend the operations of businesses whose customers and employees are at high risk for contracting and spreading the COVID-19 virus.

33. I declare under penalty of perjury, that the foregoing is true and correct.

This the 18<sup>th</sup> day of October 2020.

  
Lee B. Smith, MD, JD, FACEP

**SMITH DECLARATION EXHIBIT 1**

## EHS Complaint Summary

3/1/2020 - 10/15/2020

Report Date: 10/15/2020

Name	Address	Sanitarian	Complaint Details	Received	Closed	Action Taken
The Mason Jar	1387 Fairmont Road	Hania Burrows	The Governor ordered all bars and restaurants to shut down a week ago. Every day on my way home from work the parking lot at the Mason Jar Saloon is full. I have not seen anyone walking out with take out or anything in their hand. Although I see people standing out front smoking even in the rain. I guess as long as the open light is not on nothing else matters. Now the police have even got the word to stop in and hang out.	03/25/2020	03/31/2020	
Wings Ole' #1	1125 University Avenue	Jennifer Costolo	Kitchen staff not wearing any type of protective masks and the cashiers are handling money and cards and then filling orders, the persons carrying orders out are touching the door handles repeatedly with the same gloved hands and then filling orders again. Food prep workers are singing over open containers of food.	05/04/2020	05/07/2020	Phone Call to Manager/Person In Charge
Tropics	2500 Cranberry Square	Ryan Walther	social distancing not being enforced	05/16/2020	05/16/2020	Investigated complaint on May 16, 2020, spoke to o
Sabraton Station	1632 Deckers Creek Boulevard	Richard McCord	Staff was not wearing masks this past weekend (not following COVID19 guidelines)	05/18/2020	05/21/2020	



Baby Squirrels Saloon	321 High Street	Jennifer Costolo	Baby Squirrels has over 100 people in facility. Everyone is standing around the bars and not keeping their distance at all. Something should be done.	05/27/2020	06/01/2020	Phone Call to Manager/Person In Charge
Big Times	327 High Street	Jennifer Costolo	Big Times has over 100 people in facility. Everyone is standing around the bars and not keeping their distance at all. Something should be done.	05/27/2020	06/01/2020	Phone Call to Manager/Person In Charge
Coach's Crab Shack - On The Lake	69 Mont Chateau Road	Ryan Walther	not all servers wearing masks	05/28/2020	05/29/2020	Spoke to owner Bron, explained the face covering g
Tropics	2500 Cranberry Square	Ryan Walther	Server handling dog bowl and petting dog, not washing hands when going back to work	06/01/2020	06/26/2020	02-Jun-2020, Made site visit, kitchen employees we
Oliverio's Ristorante	52 Clay Street	Jennifer Costolo	Facility not practicing social distancing.	06/02/2020	06/11/2020	Phone Call to Manager/Person In Charge
Tropics	2500 Cranberry Square	Ryan Walther	above social distancing capacity inside and out, people are sitting elbow to elbow at the bars.	06/02/2020	06/26/2020	02-Jun-2020, Made site visit, kitchen employees we
Fat Angelo's Pizzeria & Pub	750 Fairmont Road	Ryan Walther	Employee's not wearing mask or gloves. Not social distancing in the waiting area. There is only one entrance/exit pathway.	06/17/2020	07/11/2020	Addressed complaint on June 26, 2020.
Wings Ole' #2	725 Chestnut Ridge Road	Natalie S Mafield	Someone needs to inspect wings ole in suncrest, they are not cleaning off the tables in between customers, table are greasy dirty and so are the floors.they are not following the COVID19 restriictions. DIRTY	06/17/2020	06/24/2020	Phone Call to Manager/Person In Charge

Oliverio's Ristorante	52 Clay Street	Jennifer Costolo	Had dinner at Oliverio's on Tuesday, June 23. No one was wearing a mask (ie. server, bartender, greeter).	06/26/2020	06/26/2020	On-site Investigation
Cheddar's Scratch Kitchen #2132	2111 University Town Centre Drive	Joe Lawson	No wearing their masks properly in the kitchen. Tested positive and still working	06/29/2020	07/06/2020	
Marilyn's of Morgantown	3013 Northpointe Plaza	Ryan Walther	Not wearing a mask	06/29/2020	07/02/2020	July 2, 2020: Spoke with management about the comp
Casa D'amici	485 High Street	Jennifer Costolo	not wearing gloves or mask	06/30/2020	07/09/2020	Phone Call to Manager/Person In Charge
123 Pleasant Street	123 Pleasant Street	Jennifer Costolo	packed bars, no social distancing, no masks. Covid-19 concern	06/30/2020	07/07/2020	
Big Times	327 High Street	Jennifer Costolo	packed bars. no social distancing. no masks. Covid-19 concern.	06/30/2020	07/07/2020	
The Back Door Bar & Tavern	485 High Street	Jennifer Costolo	packed bars. no social distancing. no masks. Covid-19 concern.	06/30/2020	07/07/2020	On-site Investigation
The Annex	376-B High Street	Jennifer Costolo	packed bars. no social distancing. no masks. Covid-19 concern.	06/30/2020		On-site Investigation
The Bank at 344 High	344 High Street	Jennifer Costolo	packed bars. no social distancing. no masks. Covid-19 concern.	06/30/2020	07/07/2020	On-site Investigation
Blaze	228 Walnut Street	Jennifer Costolo	packed bars. no social distancing. no masks. Covid-19 concern.	06/30/2020	07/07/2020	
Baby Squirrels Saloon	321 High Street	Jennifer Costolo	packed bars. no social distancing. no masks. Covid-19 concern.	06/30/2020	07/07/2020	On-site Investigation

Fat Daddy's	444B Chestnut Street	Jennifer Costolo	packed bars. no social distancing. no masks. Covid-19 concern.	06/30/2020	07/07/2020	On-site Investigation
Liquid Lounge	233 1/2 Walnut Street	Jennifer Costolo	packed bars, no masks, no social distancing. Covid-19 concerns.	06/30/2020	07/07/2020	On-site Investigation
CODE	471 Chestnut Street	Jennifer Costolo	packed bars. no social distancing. no masks. Covid-19 concern.	06/30/2020	07/07/2020	On-site Investigation
Ray G 4th and Goal LLC	234 1/2 Walnut Street	Jennifer Costolo	Covid-19 concerns. no masks. no social distancing. packed bars.	06/30/2020	07/07/2020	On-site Investigation
Joe Ma Ma's	345 High Street	Jennifer Costolo	packed bars, no social distancing, no masks. Covid-19 concern.	06/30/2020	07/07/2020	On-site Investigation
Pryzm	335 High Street	Jennifer Costolo	packed bags. no masks. no social distancing. Covid-19 concerns.	06/30/2020	07/07/2020	On-site Investigation
Whisper Night Club	491 1/2 High Street	Jennifer Costolo	Covid-19 concerns. no masks. no social distancing. packed bars.	06/30/2020	07/07/2020	On-site Investigation
Gibbie's	368 High Street	Jennifer Costolo	Covid-19 concerns. no masks. no social distancing. packed bars.	06/30/2020	07/07/2020	On-site Investigation
Starport Arcade and Pub	471 Chestnut Street	Jennifer Costolo	Covid-19 concerns. no masks. no social distancing. packed bars.	06/30/2020	07/07/2020	On-site Investigation
Vice Versa	335 High Street	Jennifer Costolo	Covid-19 concerns. no masks. no social distancing. packed bars.	06/30/2020	07/07/2020	On-site Investigation
The Sports Page	325 High Street	Jennifer Costolo	Covid-19 concerns. no masks. no social distancing. packed bars.	06/30/2020	07/07/2020	On-site Investigation

Olive Garden #1681	1340 University Town Centre Drive	Richard McCord	server tested positive, last worked on 6/27	07/02/2020	07/02/2020	
V F W Post #9916	340 Holland Avenue	Jennifer Costolo	not social distancing	07/08/2020	07/09/2020	Phone Call to Manager/Person In Charge
Buffalo Wild Wings, UTC	8735 University Town Center Drive	Richard McCord	positive COVID19 case	07/14/2020	07/15/2020	
Outback Steakhouse #4962	510 Venture Drive	Ryan Walther	Outback Steakhouse are giving Patrons paper towels to put over their face if they don't have a mask.. They said if a customer did not have a conversation with a wait staff more than 15 minutes they are safe. There was a worker that tested positive here; They did not shut the place down. They only sent a few people home. Caller is concerned because she has a family member that works there.	07/14/2020	07/17/2020	July 17, 2020: Spoke to manager, i explained that
Starz Hot Spot @ Greenbag	256 Greenbag Road	Natalie S Mafield	not wearing masks	07/17/2020	07/20/2020	Routine Inspection
Paula's, Westover	150 Holland Avenue	Jennifer Costolo	not wearing masks	07/17/2020	07/19/2020	Complaint Inspection
Sabraton Station	1632 Deckers Creek Boulevard	Natalie S Mafield	five people out with Covid and she said her friend is going to work sick?	07/18/2020	07/22/2020	Phone Call to Manager/Person In Charge
Buffalo Wild Wings	1098 Suncrest Towne Centre Drive	Natalie S Mafield	My son works at Buffalo Wild Wings in the Suncrest Towncenter. He is the 3rd employee this week to test positive for COVID19. 2 other employees tested positive on	07/19/2020	07/19/2020	Phone Call to Manager/Person In Charge

			June 9th. So, a total of 5 positive employees in the last 2 weeks. They scheduled my son to work last night BEFORE his test results came back today. Thank goodness he called off. They are being careless and not following the order to close for cleaning (that I know of).			
Wings Ole' #1	1125 University Avenue	Jennifer Costolo	masks are not being worn by employees.	07/20/2020	07/28/2020	On-site Investigation
Casa D'amici	485 High Street	Jennifer Costolo	Complainant and girlfriend got sick after consuming food delivered thru GrubHub from Casa D'Amici.	07/21/2020	07/28/2020	Routine Inspection
R & R Hot Spot	670 Blue Horizon Drive	Richard McCord	R n R hot spot Is not following any of the requirements for Covid. Employees and customers not wearing masks or taking temperatures. Most of their machines are not six feet apart or have dividers. And many people going in to hangout and drink I thought all places like this had the same rules.	07/23/2020	07/27/2020	
Oliverio's Ristorante	52 Clay Street	Jennifer Costolo	Facility is not complying with Covid-19 requirement. Customers are not social distancing. Owner plus 3 individuals have tested positive for Covid-19 virus.	07/25/2020	07/28/2020	Phone Call to Manager/Person In Charge
2041 University Ave LLC dba Sunnyside Bullpen	2041 University Avenue	Natalie S Mafield	Reporting that Sunnyside Bullpen bar is not in compliance with the bar closure. This bar's balcony is	07/27/2020	08/04/2020	On-site Investigation

very close in proximity to the balcony of my children's apartment and due to the high capacity with little to no mask use, forces them not to be able to utilize their space during bar hours.

My children were already exposed and one subsequently contracted covid prior to the closure due to the blatant disregard for community by the owner of Code bar who refused to let his employees call off sick which resulted in several of them and their close friends testing positive.

I had been exposed to my son before knowing he was positive and due to this fact and working directly with the public, I was forced to report my exposure and miss two weeks of work as well as quarantine from my son when he needed me the most. Thankfully he has recovered fully and I tested negative and returned to work today, but the establishments that are not following protocol that are keeping this going and Mo

Mason Jar Saloon 1387 Fairmont Road Joe Lawson

I don't know if the Mason Jar is a restaurant too but there have been a lot of complaints about

08/04/2020

08/04/2020

Filed as Nuisance Complaint

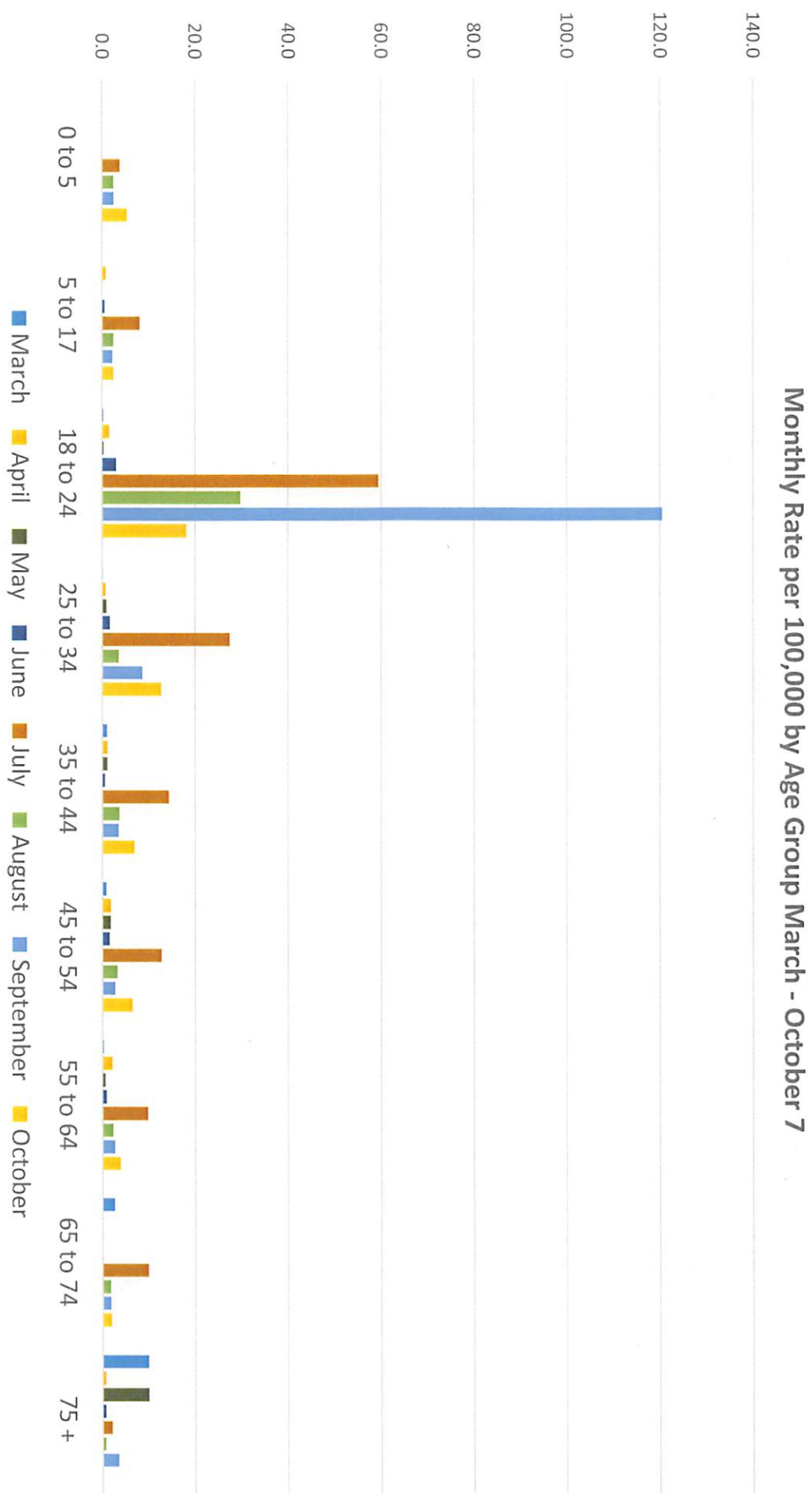
			the parking lot being packed with cars.			
			At 5:30 we passed the Mason Jar on rt 19. Parking lot was packed and ppl were still pulling in. Ive never been in there but i doubt its big enough to social distance. And im not sure if its a bar or restaurant but if its a bar, it shouldnt have been open at all			
Dockside Grille	69 Mont Chateau Road	Ryan Walther	The dockside grill at cheat lake is not practicing social distancing. They had entertainment in 8/8/2020. The bathrooms there are also beyond disgusting with urine and vomit all over the floors. During covid they are definitely in violation.	08/09/2020	08/21/2020	Investigated complaint August 13: Discuss compla
Chipotle Mexican Grill	17 Chaplin Hill Road	Richard McCord	employee's not wearing mask and also wearing them under thier chin	08/12/2020	08/16/2020	
Keglers Sports Bar	735A Chestnut Ridge Road	Natalie S Mafield	not wearing gloves and vaping in kitchen	08/14/2020	08/20/2020	Routine Inspection
Texas Roadhouse	3505 Monongahela Boulevard	Natalie S Mafield	Texas Roadhouse's dining room layout does not comply with social distancing regulations. They have all the large booths open and people sit right next to each other. Every booth is filled with smaller booths closes across the aisle. It should at least stagger every other side of the aisle.	08/27/2020	09/08/2020	Routine Inspection

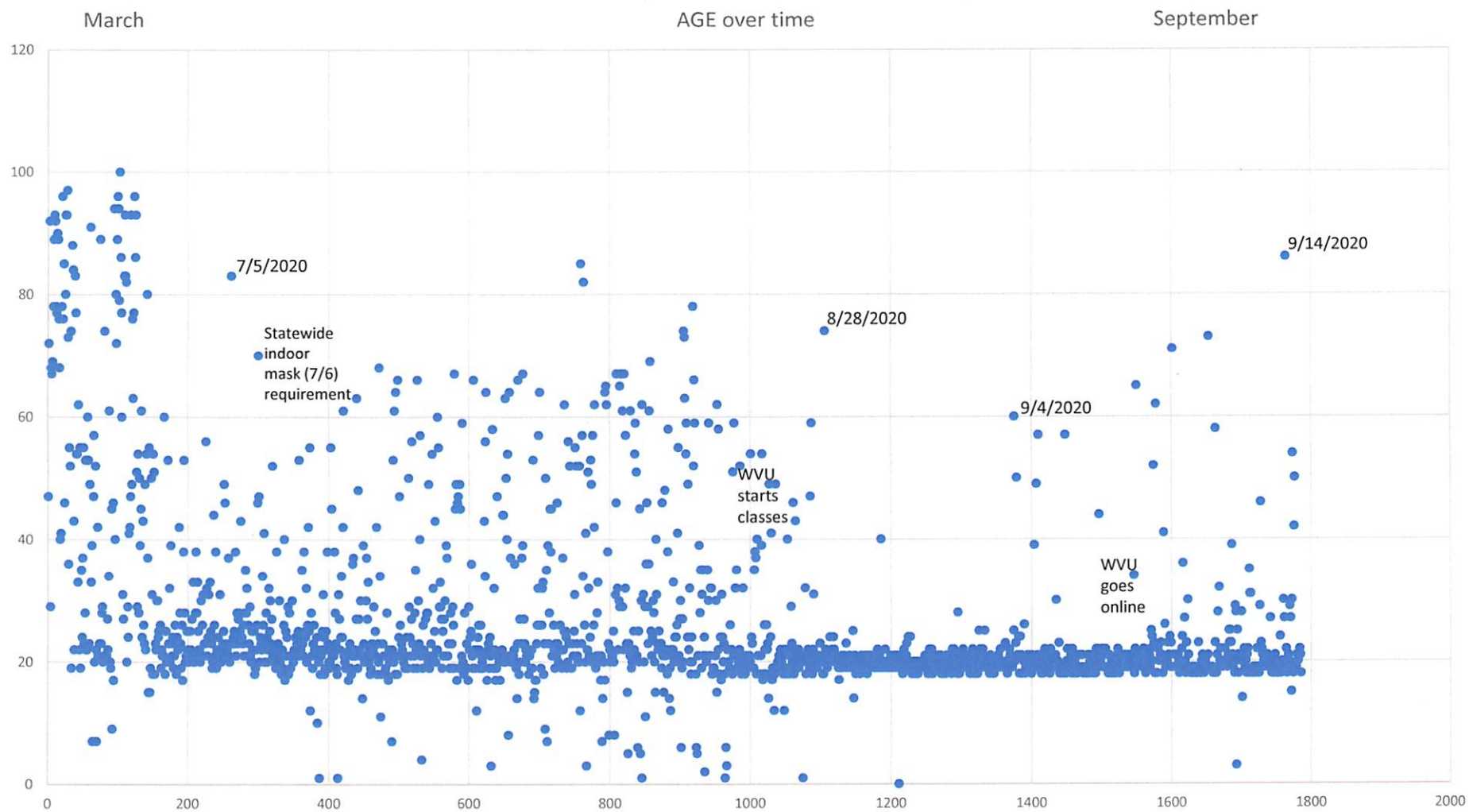




**SMITH DECLARATION EXHIBIT 2**







Monongalia County COVID-19 Age (years) by Case March 10 to October 16 2020

